No. 115.

Brief of Miller for P. E.

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In the Supreme Court of the United States.

October Term, A. D. 1900.

The City of Lampasas, Plaintiff in Error,

vs.

James M. Bell, Defendant in Error.

Error to the United States Circuit Court for the Western District of Texas, at Austin.

Brief for Plaintiff in Error.

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AUSTIN STEAM PRINTING COMPANY

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I.

This suit was brought in the United States Circuit Court for the western district of Texas, on June 21st, 1897, by James M. Bell, a citizen of the State of Pennsylvania, against the City of Lampasas, a city alleged to have been incorporated under the laws of the State of Texas.

The plaintiff by his amended petition filed on 11th day of July, 1899, seeks to recover, together with interest thereon, the amount of certain unpaid coupons for interest on "Lampasas City Waterworks Bonds."

The essential allegations of plaintiff's petition were that

the defendant was "a municipal corporation duly chartered under the laws of the State of Texas," and as such was authorized by its charter to construct waterworks and issue bonds for that purpose; that by virtue of these powers and of the laws of the state, it did on January 6th, 1885, by ordinance duly passed, provide for the issuance of forty bonds of one thousand dollars each, with interest coupons attached, and did further provide that the bonds should, among other things, at the time of their issuance be registered by the city treasurer, and did further provide that said bonds should be sold and the proceeds thereof devoted exclusively to the construction of a suitable system of waterworks for fire protection, etc.; that in pursuance of said ordinance and by virtue of its charter powers and for the purpose of providing funds to construct a system of waterworks, defendant did, on March 27th, 1885, duly execute, in accordance with the requirements of said ordinance, its said forty interest bearing coupon bonds (setting out copy of one of said bonds) which is signed as follows: "W. J. Standefer, Mayor; S. S. Potts, Secretary; ....., Comptroller, State of Texas S. S. Potts, Secretary City of Lampasas; W. S. Morris, Treasurer City of Lampasas;" that the said bonds were registered by W. S. Morris as its treasurer, by his signature thereon as above appearing, and said bonds were duly registered by the comptroller of the state, and a certificate to that effect signed by him was endorsed thereon; that said bonds were by defendant placed upon the market and sold in due course of trade, and defendant received for the same forty thousand dollars in money, for the purpose of providing a system of waterworks, and thereby became liable to the bearer of each of said bonds and coupons in the several sums therein specified; that plaintiffs, in due course of trade and for valuable consideration, purchased and became the owner of the coupons in suit, and although they were past due, the defendant refused to pay same in the sum aforesaid. (Tr. 1.)

It was not alleged in plaintiff's petition whether defendant

was incorporated under the general laws of the state, or by special act of the legislature; nor were the provisions of its charter set forth, either in substance or effect; nor did it appear that the city council was authorized by the city's charter to pass the ordinance providing for the issuance of bonds nor any other ordinance for such purpose. It is recited on the face of the copy of the bond set out in the plaintiff's petition that a copy of the ordinance by virtue of which the bond was issued, was printed on the reverse side of the bond, but the ordinance, neither in terms nor substance is set forth in the petition. It further does not appear from the face of the bond, copy of which is set out, that the bonds were registered by the city treasurer, or by the comptroller of the state, or that the latter endorsed on the bonds his certificate of registration, as required by the statutes of the state.

The defendant in its answer demurred generally to the petition, and specially excepted to it on account of the defects next above mentioned, and for the further reason that it appears from said petition that defendant was incorporated under the general laws of the State of Texas, which general laws, in so far as they relate to the formation of municipal corporations, and all charters of and attempts to create municipal corporations thereunder were null and void, the legislature in the enactment of such general laws having attempted to delegate to the voters the right to form municipal corporations and fix the boundaries thereof. (Tr. 5.) The court overruled the demurrer and exceptions. (Tr. 38.) The defendant answered by general denial and then specially alleged:

(1.) That defendant was incorporated by special act of the legislature, April 18th, 1873, and from then until now has continued to be a municipal corporation; that neither the bonds nor coupons in suit were issued or signed by its authority, nor by the authority of any of its officers; that the organization assuming defendant's name, when the bonds were issued in 1885, and whose officers signed the bonds, was never incorporated, that said bonds were not

the act of defendant, and therefore it was not liable thereon. This plea was under oath.

(2.) That the special act incorporating defendant in 1873 defined its territorial boundaries, within which was an area of about 553 acres, established all its offices and provided for the election of its officers at an election held by the mayor and three aldermen on the first Monday in January every second year after the first election under the charter; that in pursuance of this act the city government of defendant was organized in 1873, and maintained its organization until sometime in the year 1876, but that from 1876 until 1890 no officers were elected within said city limits, and no city government was actively maintained.

That in 1893 the county judge of Lampasas county, ignoring the said incorporation of the City of Lampasas, upon the application of certain voters, some residing within said city limits and others without; entered an order for an election to be held to determine whether or not a town should be incorporated under the name of "The City of Lampasas," with the boundaries mentioned in the order, which boundaries were fixed by the signers of said application and included an area of about 1500 acres; and afterwards, on March 14th, entered an order on the minutes of the commissioners court—after reciting in said minutes that a majority of the votes cast at said election were in favor of such corporation—that the inhabitants of said area were incorporated as the City of Lampasas; that this area included most of the territory of the City of Lampasas incorporated by said special act; and twice as much territory in addition thereto—twice as many lots and blocks actually occupied as town property—and was occupied by nearly twice as many inhabitants as were within the bounds described in 1873. That said county judge then made an order for the election of officers of said territory and organization, and on the 17th day of April, 1883, the inhabitants of said entire extended territory elected the various officers provided for by the general laws of Texas for towns, and thereafter other

elections were held within said territory from time to time for municipal officers, in accordance with the general laws of the State, but not in accordance with the provisions of said special act of 1873, and until the fall of the year 1889; that the bonds and coupons in suit were issued by the organization claiming the name "City of Lampasas" and operating within said larger area, according to the provisions of the general laws of the state, and were signed by the officers of that organization, but that said officers in issuing and signing the bonds did not attempt or pretend to act for this defendant or to bind it, but attempted and held themselves out as having power to bind the organization operating under the general laws, and which claimed to have been created by the proceedings undertaken in 1883.

That at the fall term 1889 of the district court of Lampasas county, the State of Texas, upon the relation of one W. B. Abney, filed a quo warranto proceeding against T. J. Largen, who claimed to be mayor of the organization of 1883, and such other persons assuming to be the officers of said corporation, to oust them from their said offices, and prevent them from further usurping the office which they claim to hold by virtue of said pretended organization; that thereupon proceedings were had in said court which resulted in November, 1889, in a judgment ousting the defendants from their offices, because the incorporation of the City of Lampasas, as attempted in 1883, was illegal; and upon appeal said judgment was by the Supreme Court of the state affirmed; that thereupon the pretended organization of 1883 was abandoned and no further proceedings or acts have since been had or done thereunder by virtue thereof.

That in 1890, an election was held within the boundaries prescribed in said special act, and officers were elected to the various offices; and they and their successors in office have been ever since and now are administering its affairs, and by reason of these facts, the defendant city should not be held liable on the bonds and coupone issued by the organization of 1883.

(3) That said bonds were issued by virtue of an ordinance passed by the persons claiming to constitute a city council, composed of five members, as provided by the general laws of the state, while the power under the special act of 1873, to pass ordinances was conferred upon a mayor and a board of aldermen composed of eight members; and if the persons who acted as the city council in passing the ordinance to issue the bonds, assumed to act as the city council of the defendant, which is denied, the ordinance was not passed by a body empowered under defendant's charter to pass same, and did not, therefore, authorize the issuance of the bonds.

(4.) That the city treasurer did not register said bonds nor endorse thereon a certificate of registration as required by the ordinance under which the bonds were issued, as appeared from the ordinance printed on the back of the bonds. The provisions of the ordinance were set out in full in defendant's answer.

(5.) That the ordinance printed on the back of the bonds provided that the bonds should be sold at not less than par and in such manner as was then or might thereafter be provided for by ordinance, resolution or otherwise, and that the proceeds of such bonds should be devoted exclusively to the construction of a suitable system of waterworks; but that the city council did not, after the passage of the ordinance make any provision for the sale of the bonds, and that they were not in fact sold for any sum, but were delivered in payment for a system of waterworks worth not exceeding twenty thousand dollars, and they were so delivered to evade the provisions of said ordinance.

(6.) That if said bonds were registered by the comptroller of the state, he did not endorse on any of them his certificate of registration authenticated by his official seal as was required by the general laws of the state, to make them valid.

(7.) That the defendant has never come into the possession of the waterworks constructed in exchange for the

bonds of said organization of 1883, or of any other property acquired by that organization, but when said organization was abandoned, said property was taken possession of by persons who claimed to own all of said bonds, and has ever since been in their vendee's possession.

(8.) That the levy and collection of a tax of twenty-five cents on the one hundred dollars valuation of taxable property within defendant's boundaries at any time during the year 1884 or 1885, or since would not produce enough revenue to pay the interest on said issue of $40,000.00 of bonds and create a sinking fund of at least two per cent. and that therefore said bonds were issued without authority of law and contrary to the provisions of the Constitution and laws of the State of Texas.

(9.) That chapter I and II, title 17, of the Revised Statutes of Texas and acts amendatory thereof, under and by virtue of which said proceedings of 1883 were had, and by virtue of which the corporation which issued the bonds was attempted to be formed, are in violation of section 1 of the fourteenth amendment to the Constitution of the United States, in that they provide for the formation of municipal corporations, with power to levy taxes on property therein, with boundaries not fixed by the legislature or by any body or tribunal before whom the residents of the territory proposed to be incorporated, could be heard; that said pretended municipal organization of 1883 was formed without defendant's voters having an opportunity to be heard on question of the boundaries of the proposed corporation, and by reason of the fact that a majority of the voters within the boundaries described in said order of said county judge resided outside of defendant's boundaries, it was possible for them to organize said pretended corporation of 1883, including all the inhabitants of defendants, without their consent, and said ordinances by virtue of which said bonds were issued providing for the levy and collection of taxes to pay said bonds, if said bonds are held to be binding on defendant, then the necessary result thereof will be that defendant's tax-

payers, who own within defendant's boundaries more than one half of the property situated within the boundaries of said organization of 1883, will be required to pay more than one half of the principal and interest due and to become due on said bonds, whereby they will be deprived of their property without due process of law. (Tr. 7 to 18.)

The plaintiff in a supplemental petition replied:

(1.) That the officers who issued the bonds, in suit were the de facto officers of defendant;

(2.) That the acts of the people within the boundaries prescribed by the organization of 1883, by voting to incorporate under the general laws, made such City of Lampasas a valid corporation within said extended territory, notwithstanding this incorporation included within said boundaries another municipal corporation previously chartered by the special act, and that all the lands and property within said extended limits have since been added to and are now within the limits of defendant city as at present prescribed, and that plaintiff is entitled to judgment establishing his debt as against the corporation with its full limits existing in 1885, when the debt was created.

(3.) That after the reorganization in 1890 of defendant's city government under the special charter of 1873, the defendant's city council, as elected by the inhabitants of the territory as defined in said special charter, passed a resolution to abandon the special charter and to adopt in lieu thereof the general laws of the state relating to cities, and thereafter on December 26th, 1890, duly and legally added the principal part and substantially all the inhabited portion of the territory outside the boundaries as fixed originally in 1873, and within the boundaries as fixed by the proceedings of 1883, and that by such addition fully ninety per cent of the population and taxable values of said organization that operated from 1883 to 1890 were brought within the City of Lampasas, as was also the system of waterworks, bridges, graded streets and other property of said organization.

(4.) That all acts of said organization of 1883, including its incorporation were validated by the acts of the legislature of the state, passed after the year 1883. (Tr. 18 to 22.)

Defendant by a supplemental answer demurred generally and specially to this supplemental petition and each allegation thereof, which demurrers the court overruled, and further denied all the essential allegations contained therein. (Tr. 22 to 24.)

A jury by written agreement duly filed was waived, and the cause submitted to the court. (Tr. 24, 37.)

The court filed its conclusions of fact, the material portions of which, are as follows:

1. That the City of Lampasas, in Lampasas county, Texas, were by special act of the legislature, approved April 18th, 1873, granted a charter as a municipal corporation, under the name of the "Corporation of the City of Lampasas," with boundaries containing an area of 553 acres, covering the original town plat and a considerable area not laid out in regular blocks. In this special charter it was provided that the qualified voters should elect a mayor and board of aldermen, consisting of eight members to hold office for the term of two years, and until their successor should be elected and qualified, and it was further provided that the mayor and five aldermen should constitute a quorum for the transaction of business. It was also provided that the first election should be held within thirty days, and on the first Monday in January of each alternate year thereafter by the mayor and three aldermen. The act made no provision for dissolving the corporation, and no period of time was fixed for the expiration of this charter.

2. Under this special charter the said mayor and aldermen were granted power by ordinance among other things, to construct waterworks, open, grade and keep in repair the streets, build bridges, open sewers, to impose and collect

taxes, not exceeding one per cent per annum, and to issue bonds for public improvements. The mayor and aldermen were authorized to appoint a city marshall who should also be ex-officio assessor and collector of city taxes, and also to appoint a secretary and city attorney, but the office of treasurer, nor any other officer than those named were provided for.

3. That officers were elected and the said municipal government was exercised by them under the said special charter from 1873 until 1876, when a mayor and a board of aldermen were elected who favored abolishing the said municipal government, and they, by formal resolutions, decided to resign and did so, and abandoned their said offices, and thereafter no steps was taken or action of any kind had under this special charter until March, 1890, after the decision of the Supreme Court of Texas in the case of Largen vs. The State of Texas, reported in 76th Texas Reports, page 323, hereinafter more fully referred to.

4. That the said City of Lampasas was in 1873, and has since continued to be the county seat of Lampasas county, and had a population in 1876 of about 800. That until the year 1882, the said town was without railroad facilities, when upon the advent of a railroad it began to grow rapidly, and by April, 1883, had a population of about 4500 people with street railroads and other improvements; about 1884, the population began to decline and continued to decline till about 1890.

5. That at all times the business portion of the town has been chiefly confined to the courthouse square and streets leading out from it, and has been within the bounds of the said special charter, but during and since 1882, business houses were built near the railroad depot outside of said bounds, and outside of the present limits, but inside of the boundaries of 1883, and business has been since transacted therein.

7. That in February, 1883, a petition was presented to the county judge of the said Lampasas county by more than

fifty qualified voters living in and around the limits of said town, asking that an election be ordered to determine whether the persons living within the limits in said petition set out should incorporate as a city of more than one thousand inhabitants, under the provisions of the general laws of Texas as contained in title 17 of the Revised Statutes.

Upon this petion the said county judge made his order and an election was held resulting in a majority vote in favor of said incorporation, some of those voting living inside and some outside of the limits prescribed by said charter, and upon the return thereof the said county judge, by proper order, declared the result of said election and declared the said city duly incorporated with the limits in said petition set out and which contained an area of 1495 acres, embracing practically all the lands included within the said special charter, and extending nearly one-half mile west, north and east thereof, to include the railroad depot.

8. That in pursuance of this incorporation, a municipal government was organized with all the officers prescribed in the general charter contained in said title 17, some of the aldermen and other officers residing outside of the limits prescribed by said special act, and exercised all the powers and functions of a city of over one thousand inhabitants, organized under the general laws of the State of Texas, levying and collecting taxes, and prescribing and enforcing police regulations without any one contesting or disputing the validity of its lawful rights to act as such until November 4th, 1889, when upon the relation of a citizen and taxpayer the district attorney, himself also a resident taxpayer, filed an information, in the nature of a quo warranto, against T. J. Largen, who was mayor, and all other persons assuming to act as city officers under this incorporation by vote of the people, alleging that the said incorporation by vote of the people in 1883 was invalid because of the fact that the said special charter granted in 1873 had never been repealed, and that the action of the officers in resigning in 1876 was without effect, and praying that the said Largen

and his associates be ousted from office, and the said incorporation of 1883 be declared invalid.

9. That said suit was instituted by the said district attorney without any direction by the attorney general or other executive officer of the state, and without making any of the creditors of said corporation parties, and upon trial resulted in a judgment ousting the said Largen and associates, which judgment on appeal was affirmed by the Supreme Court of Texas on the 31st day of January, 1890, and its opinion may be found in Vol. 76 at page 323, of the official published reports of said court.

10. That after the decision of the Supreme Court affirming said judgment of ouster, the said Largen and associates ceased to act, and upon an order for the election of mayor and aldermen under the special charter of 1873, made by the county judge of Lampasas county, an election was held by persons living within the limits of said charter on the 18th day of March, 1890, and on March 22nd, 1890, by unanimous vote of the city council it was resolved to accept the provisions of "Title XVII of the Revised Statutes of the State of Texas, in lieu of the charter granted by the legislature," and a copy of this resolution was duly certified and recorded as required by law, and said city at once assumed to act under the general charter provided in said title 17, and are now acting thereunder.

11. That on December 26th, 1890, by a vote of the majority of the resident citizens of the added territory hereinafter mentioned, there was added to the limits of the city as set out in the special charter of 1873, the greater part of the land west of the same, which was included within the limits of 1883, and one tier of blocks additional, since which time the said city government has assumed jurisdiction over said added territory, but has not assumed any jurisdiction over that part lying north and east of said original limits, and which was included within the limits of 1883.

12. The area of the territory added in December, 1890,

was 428 acres, which embraced the greater part of the residence property of the city, outside of the original charter limits of 1873.

13. That the said territory lying north and east of said original limits and which was within the limits of the charter of 1883, as adopted by the vote of the people, has situated therein seventy-seven residence houses, occupied by persons, ninety per cent of whom follow some kind of business within the town as defined by the charter limits of 1873. (A map is made part of this finding and will be found on page 27 of record. This map shows the original boundaries of defendant, its present boundaries, and the boundaries of the organization of 1883.)

14. All the books and papers of the city government of the City of Lampasas under the charter of 1873 and 1883 were lost and could not be found, except the assessment rolls for the year 1889, from which it appears that the assessed values of all lands within the city limits of 1889 was $664,429.00 and that the personal property was about $400,000, and that the said assessment was divided as follows as to the lands, no division being shown as personal property, viz: within the limits of 1873, $452,444.00; within the part added in December, 1890, $157,915.00, and within the parts north and east $68,970.00.

15. The said rolls show the names of 438 voters divided as follows, viz: Residing within old limits of 1873, were 175; residing on part added in December, 1890, 167; residing on part north and east, 96.

16. In January, 1885, the city council of said City of Lampasas elected under the provisions of the general charter contained in title 17 aforesaid, and assuming to act thereunder and not under the provisions of the charter of 1873, in good faith and response to a general demand of the business men of the city for fire protection and to furnish water for the city, then having a population of about 4500, determined to build a system of waterworks for the city and to pay for the same with the proceeds of sale of bonds of the

city and to this end, after full and open discussion, did pass ordinances to the following effect, viz:

[In this (16th) finding the ordinance is set forth in full and the material portions thereof are as follows:]

Sections 1, 2 and 3 of said ordinance authorize the mayor to have the bonds engraved and fix the amount ($40,000) to be issued, the rate of interest and date of maturity.

Sections 4 and 5 of said ordinance are as follows:

Section 4. Said bonds shall at the time of their issuance, be dated and signed by the mayor, countersigned by the city secretary, and registered by the city treasurer.

Section 5. The city secretary and the city treasurer shall each keep a record of the number, date of issuance and amount of said bonds, and the number, amount and date of maturity of the coupons thereto attached, and shall endorse the countersigning and registration thereof on each of said bonds.

Section 7 provides for the levy and collection of ad valorem taxes to pay the principal and interest of the bonds.

Section 10 of said ordinance is as follows:

Section 10. The bonds herein provided for shall be sold at not less than par, and in such manner as is or may be hereafter provided by ordinance, resolution or otherwise, and the proceeds of said bonds shall be devoted exclusively to the construction of a suitable system of waterworks for fire protection, family supply, and other public and private purposes, and for the purpose of such fire department supplies as may be deemed necessary by the council; said system of waterworks to be operated in such manner as may be hereafter provided by ordinance, resolution or otherwise.

Filed January 6th, 1885. S. S. POTTS, Secretary.
Passed January 6th, 1885. S. S. POTTS, Secretary.

I approve the above ordinance, January 6th, 1885.

J. W. STANDEFER, Mayor of City of Lampasas.
Attest: S. S. POTTS, Secretary.

18. The city council that passed said ordinance above recited, was composed of the mayor and five aldermen, all of whom were elected by a general vote of the entire corporation within the limits of the charter under the incorporation of 1883. Two of the said aldermen and the city secretary resided in the territory outside of the charter limits of 1873, and one of said two aldermen resided in the territory northeast of said limits and outside of the present city limits.

19. After the adoption of the ordinance as aforesaid, the said city council advertised for bids for the construction of a system of waterworks, and personally inspected similar waterworks in neighboring towns, and also tried to negotiate a sale of said bonds for cash. Failing to effect a sale of bonds by the time set for receiving the bids, the letting of the contract was postponed; at this time several bidders were ready to submit plans and bids, but as all contemplated being paid in cash no bids were made or received. There was present at this time prepared to submit a bid a responsible party, willing to build a system of waterworks for $25,000 in cash, but it is not known what kind of a system of waterworks this party intended building, as to the size of the mains, pumps, stand pipes or other details, or whether he proposed to build as good a system as was subsequently built, the fact being that this bidder demanded cash payment and was unwilling to take bonds in payment.

20. At a later date the said city council awarded the contract to a bidder who was willing to build a system according to his plans at the price of forty thousand dollars, to be paid in bonds of the said city, and this contractor proceeded to build the said system, and the same was fully tested by the city council before acceptance, and upon such test and approval the said works were accepted and paid for by the delivery by the city council of the bonds as called for in the contract. The city officers paid for the waterworks in bonds because they had been unable to sell the bonds for the money. The bonds were not considered good for their face value: if

they had been so considered, the waterworks could have been constructed for less.

21. The said system of waterworks as built, was worth at cash value based upon the cost of construction, the sum of $26,279.00 without allowing anything by way of profits to the contractor.

In the 22nd finding one of the bonds issued in payment for the waterworks is set forth in full, they being for $1000 each with interest coupons attached, dated March 27th, 1885, styled, "Lampasas City Waterworks Bonds," and signed by W. J. Standefer, Mayor, and attested by S. S. Potts, Secretary, with his seal. In the upper left hand corner in transverse form and separated from the bond by vignette line was the following: ".....,
Comptroller, State of Texas; S. S. Potts, Secretary City of Lampasas; W. S. Morris, Treasurer City of Lampasas." On the back of the bond was the following endorsement: "Registered March 28th, 1885, W. J. Swain, Comptroller," but no seal was affixed to such signature or endorsement. On the back of the bond was printed a copy of the said ordinance. The bonds did not bear any evidence of registration by the city treasurer or comptroller of the state other than what appears above, but the bonds were in fact registered in the office of the comptroller as found by the court in the 23rd finding. In the 24th finding the court found that recovery on some of the coupons sued on was barred by the statute of limitation, and that on the others there was due $2100 principal and $452.70 interest.

25. At the time of the affirmance of the judgment in Largen vs. State, 76 Texas, 323, one H. E. Hedeman, was in charge of the waterworks so acquired for said bonds, he having taken charge of said waterworks as superintendent before the dissolution of said organization of 1883; he held possession of said waterworks under a claim of one hundred and fifty dollars back salary due from the dissolved organization and for some other monies due him for a house placed on the waterworks grounds; asserting such claim he re-

mained in charge of such waterworks for over one year from the dissolution of said corporation of 1883. He delivered possession of said waterworks to Coler & Bro., bankers and brokers of New York City, through their agent, W. L. Vining, for the reason that Coler & Bro., paid him the debt due him and for his interest in said house, said Vining at the time exhibiting to him one of said bonds of said series, and stating that said Coler & Bro., owned it and all other bonds of said series, and said Coler & Bro., and their assigns, have from that time controlled and claimed to own said waterworks and still control and claim to own said system of waterworks. The bond exhibited to said Hedeman by Vining was not one of the number from which any of the coupons in suit were taken; nor did said Coler & Bro., own or represent any of the owners of the bonds from which the coupons in suit were taken. Said Hedeman did not pretend to act for the City of Lampasas in making said settlement, and only assumed to act in the protection of his own claim, and plaintiff refused to act with Coler and has had no connection with him in any way.

26. Since the reorganization of the city government of 1890 under the special charter of '73 and the general charter adopted immediately thereafter, the City of Lampasas has exercised no control over said waterworks, but has paid monthly, first to said Hedeman, and then to Coler & Bro., for the use of water supplied by said waterworks system and since said reorganization in 1890, said City of Lampasas has not taken possession of any other property within its limits that was acquired or constructed between 1883 and 1890, except one bridge built prior to 1890, but which was not paid for, but which, on account of such non payment, was taken possession of by the builders and sold by them to the county of Lampasas and the city as organized in 1890.

27. The pumping station of the waterworks as originally constructed was situated within the corporate limits as defined in the charter of 1883, but was removed by the

city in 1887 to a point without the corporate limits of 1883, and has remained at said place ever since. The stand pipe was located at a point near the west line of the charter limits, and the distributing of water mains leading from such stand pipe, were distributed through the part of the city west of the original charter limits of 1873, thence through the business part of the city within said original limits and extending eastward and northward to the railroad depot, and said stand pipe and all of said distributing mains and fire hydrants are within the limits of the city now existing (composed of the original charter limits and the territory added in 1890), except that for a distance of about 900 yards one of said mains extended northward to said depot with one fire hydrant thereon.

28. There has at all times been a well defined business center in the City of Lampasas, which is within the limits of the charter of 1873 and between 1885 and 1890, a number of business houses and residences were established in the neighborhood of the railroad depot, all of which were within the limits of the charter of 1883 but are not within the limits over which the present city government assumes jurisdiction. Within this territory there are seventy-seven inhabited dwellings and two vacant dwellings. Of the persons occupying these dwelling houses ninety per cent did business within the present limits of the city.

29. The majority at the election held in 1883 to determine whether the City of Lampasas should be incorporated under the general laws was 85, and at that time the population within the boundaries sought to be incorporated was four or five thousand.

31. That between 1885 and 1889, there was great depreciation in property values and decrease in population in the original limits of the City of Lampasas, in the part thereof added to the city in 1890, and in that part of the city organized in 1883 that is not included in either the original limits of 1873, or in that added in 1890, but such decrease and depreciation was greater in that part not in either said

original limits or said territory organized by the proceedings of 1883, the least decrease and depreciation being in the limits prescribed by the act of 1873.

All the foregoing findings were based upon agreements made on the trial, to which the court made the following additional finding:

From the facts agreed upon by the parties as above set out, the court concludes that within the City of Lampasas as now organized and has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883 by vote of the people, and which was recognized and acted upon by them as a valid city government from its adoption until the quo warranto proceedings against Largen and his associate officers in 1889, during which time the officers assuming to act as officers under said general charter were elected in good faith by all persons residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same. (Tr. 24 to 36.)

Upon such findings the court based the following conclusions of law:

CONCLUSIONS OF LAW.

1st. The coupons in suit constitute a valid and existing liability against the present City of Lampasas except that coupons Nos. 9 to 15, inclusive, being 42 in number, are barred by the statute of limitation and the remaining 60 coupons sued upon not being barred by the statute are valid and the defendant should be required to pay for the same. Shapleigh vs. San Angelo, 167 U. S., 646; City of Lampasas vs. Talcott, decided by Circuit Court of Appeals, 5th Circuit, on the.....day of.....18..... (Tr. 36 and 37.) Judgment was rendered for plaintiff as prayed for. (Tr. 38.) The plain-

tiff in error duly excepted in open court to the judgment and conclusions of the court (Tr. 38) and now asks that the judgment be revised on account of errors assigned, those deemed material being as follows:

1st. The court erred in overruling the defendant's general demurrer and its 8th special exception to plaintiff's amended petition. This was erroneous, because the only legitimate inference to be drawn from said petition is that it seeks to recover from the defendant as a municipal corporation, attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, no special statute being pleaded, which general laws relative to the formation of municipal corporations and the levy and collection of taxes thereby, are in conflict with section 1 of the 14th amendment to the Constitution of the United States, in that the boundaries of such corporations are not fixed by the legislature, nor does the law make any provisions by which said boundaries can be fixed by any tribunal before which the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the corporation.

3rd. The court erred in overruling defendant's third exception to plaintiff's first supplemental petition wherein the plaintiff pleaded the validating acts of the legislature, passed after the year 1890, as curing irregularities in the charter of 1883. Said ruling was erroneous for the following reasons, viz:

I. Said validating acts were not intended to, did not purport to and did not validate such proceedings as those pleaded by plaintiff and defendant as having been done and had in 1883, whereby a city was attempted to be incorporated so as to embrace within its boundaries with other territory, an existing city.

II. Said validating acts attempt to validate acts done or attempted to be done under said articles of the Revised Statutes, relating to municipal corporations, which were in violation of section 1 of the 14th amendment to the Constitu-

tion of the United States for the reasons as stated in the first assignment of error herein.

III. Said validating acts were in effect special acts and therefore void.

4th. The court erred in its last conclusion of facts, its conclusions of law, and the judgment rendered thereon because: The organization formed in 1883 under and by virtue of which the bonds, the coupons of which are sued on, were issued, was not only voidable, but wholly void, for the reason that such organization was attempted to be formed under the general laws of the State of Texas, with power to levy and collect taxes, which general laws of the State of Texas then in force and embraced in title 17 of the Revised Statutes of 1879, relating to the formation of municipal corporations, and the levy and collection of taxes thereby were in violation of section 1 of the 14th amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed by the legislature, nor do said statutes make any provisions by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation.

6th. The court erred in its last conclusion of fact, its conclusions of law, and the judgment rendered thereon, because the defendant was incorporated as a city by a special act of the legislature in 1873, which fixed its boundaries, and it has continued ever since as a municipality without any change in its charter until 1890; and the attempted organization of a municipal corporation in 1883 under the general laws of the state (even conceding said law to be constitutional) including nearly three times as much territory as was included within the boundaries described by said special act, not by the inhabitants of defendant, but by a majority of the inhabitants of such larger territory, a majority of such inhabitants residing outside of defendant's limits was without

authority of law, null and void and did not destroy or effect the corporate existence of defendant.

7th. The court erred in its last conclusion of fact, its conclusions of law and the judgment thereon, because if the organization of 1883 was a de facto corporation, so that the bonds issued by it would be obligations against that corporation, or the inhabitants thereof, the conclusions of fact show that defendant was not, when said bonds were issued, or when the organization of 1883 was dissolved or abandoned in 1889, and is not now, the same corporation as that attempted to be formed in 1883 under the defendant's name, did not and does not embrace the same inhabitants, territory or property substantially, is not the successor thereof, and has not at any time received or acquired any property that may have belonged to said organization of 1883, so that, if said bonds are in any respect valid obligations, as against the municipality called the City of Lampasas, organized in 1883, they are not obligations on which defendant is liable.

8. The court erred in its conclusions of law, and the judgment rendered thereon, because there cannot be a de facto corporation including within its boundaries the greater part of the inhabitants and territory of an existing legal municipal corporation, a large amount of other territory, and a large number of other inhabitants, with power to bind by its contracts or acts such existing legal municipality.

9. The court erred in its conclusions of law and its judgment rendered thereon, because the persons who, as officers of said organization of 1883, issued said bonds and passed the ordinance authorizing the issuance of same, were not the officers of defendant, were not the same officers as were by defendants charter authorized to pass ordinances and issue bonds, were not when they passed said ordinances and issued said bonds, assuming or pretending to act as the officers of this defendant, and were therefore not de facto officers of defendant.

10. The court erred in its conclusions of law and the judg-

ment rendered thereon, because when the illegal organization of 1883 was abandoned in 1889, having within its boundaries 438 taxpaying voters and an area of 1495 acres, its liabilities did not become the liabilities of defendant, which then had only 175 taxpaying voters and an area of 553 acres, and not then being liable, the defendant did not become bound for said liabilities in December, 1890, when it attached 428 acres out of the 942 acres of the territory of the organization of 1883, not included within defendant's boundaries.

11. The court erred in its last conclusion of fact, its conclusion of law, and the judgment rendered thereon, because at the time of the issuance of said bonds, the only legal existing city was the defendant with the boundaries fixed by its charter of 1873, and at that time the property within such boundaries did not exceed in value the sum of one million dollars, and the levy and collection of a tax of 25 cents on each one hundred dollars in value of the property within said boundaries would not then, or at any time since, produce enough revenue to pay the interest on the bonds mentioned in plaintiff's petition and create a sinking fund of at least two per cent, and such issuance of bonds was therefore illegal as being in violation of section 9 of article 9, and section 7 of article 11, of the Constitution of the State of Texas, and no subsequent change in defendant's boundaries or increase in its territory or taxable property, would render such bonds valid.

12. The court erred in its conclusions of law and the judgment rendered thereon, because the city treasurer did not endorse on said bonds his registration thereof as required by the ordinances by virtue of which they were issued, and which ordinances were printed on the back of the bonds, nor did the comptroller of the State of Texas endorse thereon his certificate of registration thereof, authenticated with his official seal, as required by the statutes of the State of Texas. These certificates were necessary in order to give the bonds validity, or if not necessary in order to give them

validity, the want of such certificates of registration destroyed the negotiability of the bonds and charged the purchasers thereof with notice of the facts, found by the court, that the bonds were not sold at par and the proceeds used in the construction of a system of waterworks, as required by said ordinances, but upon the contrary the whole issue of $40,000 of bonds was traded for a system of waterworks, worth much less than that sum, and that this was done to evade the provisions of said ordinances, and because said bonds were issued before one of the ordinances authorizing their issuance and printed on the back thereof, had taken effect.

13. The court erred in its last conclusion of fact, its conclusion of law, and the judgment rendered thereon, because there was no such acquiescence on the part of defendant or its inhabitants as would estop it or them from disputing the validity of the bonds issued without authority of law by the organization of 1883.

14. The court erred in that part of its last or additional conclusion of fact, wherein it finds that there is embraced in the City of Lampasas as it has existed since 1890, substantially all the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883, by vote of the people, such finding being immaterial for the following reasons, viz:

I. The organization of 1883 and all its acts were void, and as it could create no debts binding on itself, the defendant, a pre-existing incorporation, would not, by adding the greater part of its territory, become liable for debts it had not itself created.

II. The debt attempted to be created being greater than was authorized by defendant's assessed values at the time of the issuance of the bonds or at any time since, could not become binding by reason of any subsequent acts of defendant.

III. The bonds not having been issued or registered as required by the ordinances under which they were issued or the statute of the state, and not having been sold at "not

less than par" as required by said ordinances, but having been traded at less than their par value for the purpose of evading the provisions of the ordinances, they would be invalid, even if defendant's territory and inhabitants had been identical with that of the organization of 1883, and defendant had been the successor thereof.

15. The court erred in its said last or additional conclusion in that it is not warranted by, but is in conflict with, the other conclusions of fact, on which it was based, which other conclusions show that there has been at no time embraced within defendant's territory, substantially all the persons and property that was embraced within the limits of the organization of 1883. (Tr. 41 to 46.)

FIRST PROPOSITION.

The general laws of the State of Texas relating to the formation of municipal corporations under which the organization formed in 1883, was attempted to be incorporated and which issued the bonds sued on in this cause, are in violation of section 1 of the 14th amendment to the Constitution of the United States, in that they provide for the formation of municipal corporations with power to levy taxes on persons and property therein, with boundaries not fixed by the legislature, or by any body or tribunal before whom the residents of the territory proposed to be incorporated could be heard, as to whether their property was such as should be included within the corporation and made subject to taxation therein.

So much of the statutes of Texas relating to the formation of municipal corporations as are deemed material are set forth in Appendix A hereto attached. We have been able to find no similar statutes in any state except Michigan, and municipal corporations formed under those statutes were in the case of People vs. Bennett, 29 Mich., 451, held to be invalid because, among other reasons, the citizens had no opportunity of being heard before any tribunal, on the

question as to what territory should be included within the boundaries. By reference to articles 340 and 506 to 514 of the Texas Statutes in force in 1883, (see Appendix A) it will be seen that fifty petitioners fix the boundaries of the proposed corporations and present their petition to the county judge. No notice of the presentment of the petition is given nor is any provision made for a hearing at which any citizen may present any objection he may have to his property being included within the limits of the corporation. Upon receiving the petition, the county judge must order an election for the purpose of submitting the question of incorporation to the vote of the people, and upon receiving the returns of the election if the majority of the votes cast are in favor of incorporation, he must make an entry upon the records of the commissioners court that the inhabitants of the city are incorporated, etc, and the city shall then be invested with all the rights incident to such corporations. Chapter V, of title 17, of the Revised Statutes in force in 1883, which is too long to be inserted in full here, authorizes the levy of various ad valorem and occupation taxes by the city councils of incorporated cities. Unquestionably the legislature would have power, in the absence of constitutional restrictions, to create municipal corporations with such boundaries as it deemed proper, but when this power is delegated it must be delegated to some body or tribunal before whom citizens of the territory proposed to be incorporated can have an opportunity of being heard as to whether their property is of that nature, or so situated, that it should be included in a municipal incorporation and made subject to taxation therein. It is not sufficient that the citizen is given a right to a hearing, after the corporation is formed, before some tribunal as to the amount of assessments on his property or as to the amount of municipal burden to be borne by him; he is first entitled to be heard before some tribunal as to whether he or his property shall be included within the bounds of the municipality and be required to bear any of its burdens; and if he is deprived of

a hearing on either of these questions he has been deprived of his property without due process of law, and any statute which deprives a citizen of these rights is in violation of that provision of the Constitution of the United States referred to in above proposition. In 2d Dillon on Municipal Corporations, 4th Ed., Sec. 183, it is said that "where municipalities are organized under general statutes, no expression of the legislative will as to the exact boundaries of any particular place proposing to be incorporated can be made. The vital question of boundaries must then be determined in some other mode * * * but how and by whom is the extent of the territory to be included within the corporate limits (which necessarily settles what property and what persons will become subject to municipal rule) to be determined? Unless specially restrained by the state constitution the legislature may delegate this power to appropriate local bodies or boards of officers."

The Texas statutes in force in 1883 did not delegate this power to any body, board or tribunal, but they permitted any fifty citizens to fix the boundaries, and left to the county judge only the duty of ordering an election on the question of corporation. There has been some question as to whether the power of the legislature to fix the boundaries of municipalities could be delegated to the court, but in the case of Forsythe vs. City of Hammond, 166 U. S., 506; this court held that the determination of the territorial boundaries of a municipal corporation was purely a legislative function, though full jurisdiction of such matters might be given to the courts. In the opinion in that case as well as in the opinion in the circuit court in the same case (68 Fed. Rep., 774) it seems to be conceded that when the constitution of a state denies to the legislature the power of creating municipal bodies or enlarging or contracting their boundaries by special act, and requires such changes to be provided for by general laws, the legislature must confer upon some tribunal the power to determine whether the conditions exist prescribed by law for the creation, enlargements or contrac-

tion of a municipal body. Very few, if any, municipal corporations would be formed were it not for the fact that such corporations are permitted to levy taxes on persons and property therein, to accomplish purposes and to carry on public improvements necessary for the health, comfort and convenience of the residents of the corporation, so that it may be said that one of the principle reasons for the state creating or authorizing the formation of such corporations is to confer upon the inhabitants thereof the power of levying and collecting taxes for the accomplishment of such purposes.

It is, therefore, just as important that every citizen of a proposed corporation should have a hearing as to whether his property should be included within its bounds as it is that those whose lands are to be subjected to taxation to pay for public improvements, such as drainage and irrigation ditches, should have a hearing before some tribunal as to whether their lands are benefited by such public improvements, where the legislature has not itself determined the lands to be benefited thereby.

In the case of Spencer vs. Merchant, 125 U. S., 345; this court held, in effect, that the legislature might itself determine the lands to be benefited by a public improvement to be paid for by taxation or such determination might by the legislature be left to another tribunal, but if left to another tribunal the persons whose lands are to be subjected to taxation to pay for such improvements are entitled to a hearing before such tribunal upon the question whether their lands are benefited or not, and that it was not sufficient if they merely have a hearing upon the amount to be assessed against their lands. In discussing a similar question this court, in Parsons vs. District of Columbia, 170 U. S., 45, said: "Where the legislature has submitted these questions for enquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the enquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice, or an

opportunity to be heard." In the case of Fallbrook Irrigation district vs. Bradley, 164 U. S., 112, there was involved the validity of the statutes of California, authorizing the formation of irrigation ditches and this court said: "The formation of one of these irrigation districts amounts to the creation of a public corporation. * * * There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which required notice to or hearing of the parties included therein, before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it. In the act under consideration, however, the establishment of its boundaries, and the purpose for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in, an assessment upon all the lands included within the boundaries of the district. The legislature thus, in substance, provides for the creation, not alone of a public corporation but of a taxing district, whose boundaries are fixed, not by the legislature, but, after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose.

"It has been held in this court that the legislature has power to fix such a district for itself, without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature, where it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the 'apportionment of the tax,' i. e., the amount of tax which he is to pay. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what land described in the petition will be

benefited, and that decision of the question is submitted to some tribunal (the board of supervisors in this case) the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself the land owner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decision of this court in Spencer vs. Merchant, 125 U. S. 345, and Walston vs. Nevin, 127 U. S., 578."

As stated above, the statutes of Michigan relating to the formation of municipal corporations were substantially the same as those of the State of Texas in force in 1883 (see Appendix A.) In People vs. Bennett, 29 Mich., 451, where corporations formed thereunder were held to be invalid the court said "a compulsory corporation can only come from direct legislative action or the action of such persons or bodies as by the law of the land be vested with sufficient delegated authority to bind the community. There are few, if any, acts of state bearing upon individuals more important than those which determine their liberty to be included in particular municipalities; and the cases are very rare in which they have not been allowed an opportunity of being heard in every step of the proceedings. It is manifest that one of the first and most vital questions involved is that of boundaries. It may be too plain for dispute that certain lands are so occupied as to require corporate organization for their convenient government. There may be, for example, in any township a small region densely inhabited with more people than all the rest. Any question on which they unite could be carried by their votes at a township election. But it would be tyrannical to allow them to determine for themselves what property should be made tributary to their local interests, in which the rest of the town had no concern. That question should be decided on its own merits by an authority so

constituted as to be presumably impartial. While there are some exceptional statutes which leave a large coercive control to the authorities vested with power of local legislation, there are few, it any, which allow an election to be ordered, or any definite step to be taken until all persons interested have had a chance to be heard." And after quoting from many decisions referring to the case under consideration the court further said "any number of resident legal voters, not less than thirty, may file a petition deseribing the location and boundaries and the number of inhabitants, and the proposed name, and asking that the question of incorporation be submitted to the resident voters. This petition is to be filed in the circuit court. Upon receiving the petition the judge is required without further enquiry or ceremony, to have entered an order in the journal, appointing a time and place in said territory for an election. The return of votes is made to the circuit judge. If the proceedings are formal he is then compelled to enter another order declaring the incorporation. In examining these proceedings the fact which is most prominent throughout, is that there is not in the whole course a single act of any importancr which is performed by any public ageney whatever, whethee legislative, executive or judicial. The propriety of the shape or boundaries of the proposed village is often the principle thing deemed necessary to be settled by the legislature when it submits a charter to the proper vote, most charters being substantially alike in their scope.

"Under this law a bare majority, collected anywhere may annex, in any direction any two square miles of land in spite of courts, supervisors and all other public authorities. The thirty signers of the petition determine absolutely the contents of the village. * * * * No one has a right of hearing, and no hearing could avail if had." Referring to this case (People vs. Bennett) Judge Dillon, in note to Sec. 183 of 1st volume of his work on Municipal Ccorporations, says that there "this subject is, with his usual ability, learnedly examined by Cambell, J., from whose opinion the doctrines of the text

have mainly been deduced." All that is said in that opinion is applicable to the organization of 1883 under defendant's name and to the statutes under which the organization was formed. These statutes provide for no hearing. The petitioners fix the boundaries and a majority of voters determine whether there shall be a corporation. As the majority of the voters of the organization lived outside of defendant's boundaries (see 15th and 31st findings of the court, Tr. 28 and 35) it was possible that the vote for the proposed corporation be carried although every voter within the territory of defendant (then an existing corporation) voted against it. Under the decisions of this court above cited, and that of the supreme court of Michigan, these statutes, we submit, authorize the taking of property without due process of law, and bonds issued by any corporation attempted to be formed thereunder are void.

SECOND PROPOSITION.

The defendant city was incorporated by a special act of the legislature in 1873, and has since continuously existed as a distinct independent municipal corporation, and the attempted incorporation under the general law in 1883 of another "City of Lampasas," not by the inhabitants of the defendant city but by a majority of the inhabitants within an area that included its territory, and in addition twice as much more territory, resulted not in a mere irregularly organized corporation, but in an organization created without warrant of law and void *ab initio*.

The facts as stated in this proposition were found by the trial court as will be seen from the preliminary statement above. Under those facts the organization attempted to be formed in 1883 was by the supreme court of Texas in the case of Largen vs. State, hereinafter referred to, held to have been created without warrant of law. The same court in other cases hereinafter cited, held similar organizations to have been created without warrant of law and void, but the

circuit court in this case, and the circuit court of appeals for the fifth circuit in the case of the City of Lampasas vs. Talcott, seem to have considered these cases to be in conflict with the opinion of this court in the case of Shapleigh vs. San Angelo, 167 U. S., 646. In the latter case the inhabitants of incorporated territory became incorporated under the general laws of Texas and issued bonds for street improvements. Its organization having been dissolved by proceedings instituted for that purpose by reason of its limits including a large amount of uninhabited pasture land, it was re-incorporated by the same inhabitants but excluding the pasture lands; the two corporations included the same inhabitants, all of the same territory that should properly be embraced within municipal boundaries, and all of the improvements for which the bonds were issued. For this reason this court held that the last was the successor of the first corporation formed and was liable on the bonds, the first corporation not being void by reason of it including pasture lands. In the opinion in that case this court said: "The doctrine successfully invoked in the court below by the defendant that where a municipal incorporation was wholly void *ab initio* as being incorporated without warrant of law it could create no debts and incur no liabilities, does not in our opinion apply to the case of an irregularly organized corporation which had obtained by compliance with a general law authorizing the formation of municipal corporations, an organization valid against everybody except the state, acting by direct proceedings. Such an organization is merely voidable." We submit that the organization of 1883 assuming defendant's name was without authority of law and void. It was not a mere irregular corporation formed by inhabitants of unincorporated territory endeavoring to comply with the laws relating to the creation of municipal corporations, but was an attempt by the inhabitants of its territory to create a municipal corporation including within its boundaries a much smaller municipality than had been incorporated by the legislature. Two distinct, independent

co-ordinate municipal corporations cannot exist at the same time in the same territory and over the same inhabitants. The objection, therefore, to a corporation—that it includes uninhabited pasture land may point out a mere irregularity, while the objection that it includes an already existing corporation evidently goes to its very foundation. In the one case a person dealing with a corporation relies upon its apparent regularity in the other case he is charged with notice of the legal existence of the first corporation and is conclusively presumed to know that the officers of the second corporation can exercise no power over the inhabitants of the first one, or create any debts to bind them. He accepts the obligations of such second corporation at his peril.

It will be seen that the statutes of Texas relating to municipal corporations (see Appendix A) provide a mode by which the inhabitants of unincorporated territory can be incorporated as a municipal corporation, and this was the mode adopted in creating the corporation of San Angelo, and the irregularity in that case consisted only in including uninhabited pasture lands. This was also the mode adopted in attempting to create the corporation of the City of Lampasas in 1883 including the existing City of Lampasas which had been created in 1873. It was a mode unauthorized by law in such cases. The statutes did provide a mode by which existing cities might accept the provisions of the general laws of the state in lieu of their charters, but this mode was not adopted or attempted to be adopted, and the defendant city continued to exist and was existing under its original charter during the entire time that the organization of 1883, assuming its name was in operation. In State vs. Denison, 71 Texas, 65, the Supreme Court of Texas said: "There is no doubt that the legislature might have provided that the inhabitants of an incorporated town might, by a majority vote, accept incorporation under the general law as was done by the act of January 27, 1858, and thereby repeal the former charter; and it would seem that this would be more in harmony

with the spirit of our institutions than is the mode provided by article 340, Revised Statutes. This was, however, a matter for the consideration of the legislature, and a town or city already incorporated, and desiring to re-incorporate under the general law must, to accomplish that, follow the mode now prescribed. If that course had been pursued, the corporation would, however, be restricted to the boundaries prescribed in the proceedings had under the act of January 27, 1858, and to attach other territory it would be necessary that the inhabitants thereof should comply with articles 343 and 503, Revised Statutes, and that the town council, by ordinance, receive the additional territory. Nothing of this kind was done, but so far as appears from the record, persons living within and without the corporate limits attempted, in their own way, to incorporate a town to embrace land not within the existing incorporation. * * * We are of the opinion that the proceedings alleged to have been had in 1887, did not create a corporation, or in any manner dissolve the corporation created in 1859."

Articles 340, 343 and 503, above cited, are set forth in Appendix A hereto, and from article 343 it will be seen that if there had been an attempt to adopt the revised statutes the corporation would have been confined to the area of 553 acres included within the boundaries prescribed by the act of 1873 instead of including an area of 1495 acres over which municipal government was sought to be established by the proceedings had in 1883. The fact that this territory of 1495 acres was included in the atttempted incorporation of 1883 shows that the intention of the people participating in the proceedings of 1883 was not to adopt the Revised Statutes in lieu of the existing charter and limit the boundaries to those of the existing corporation, but was to create a new corporation by a mode and under circumstances not authorized by law.

In Largen vs. State, 76 Texas, 323, the identical case at bar was before the Supreme Court, and it was held "that the municipal corporation known as the City of Lam-

pasas, incorporated under the act of April 18th, 1873, still exists." And after quoting and referring to the statutes above cited, the court further said "through all the legislation bearing upon the question, there is nothing to intimate the intention to permit existing corporations to incorporate under the general law, and thus dissolve the existing corporation in any other manner than that prescribed by the act of March 15, 1875." (Rev. Stats., Art. 340.) The court proceeded to hold that the organization of 1883 was without warrant of law.

In Buford vs. State, 72 Texas, 182, the facts were similar to those in the Largen case, and the Supreme Court held that the incorporation under the general law of territory including an existing corporation was without authority of law. The Largen, Denison and Buford cases were cited with approval in Harkness vs. State, 76 Texas, 566. In that case the facts were that the town of Colorado was, in February, 1882, incorporated as a town of more than 200 and less than 1000 inhabitants under the provisions of chapter 11, title 17, of the Revised Statutes of Texas (see Appendix A.) In 1883, ignoring that corporation, the citizens of that town and the surrounding territory attempted to incorporate as a city by petition and vote of the citizens and after such election a municipal government provided for cities of over one thousand inhabitants was organized. The supreme court held that there was nothing in the statutes relating to cities and towns which countenanced the holding that an existing corporation could be destroyed by such a procedure, and that the original corporate existence given through the proceedings of February, 1882, continued and still exists. It is true that in each of the above cases direct proceedings were instituted by an officer in behalf of the state, but the opinion in each case was that the attempt to create under the general laws a corporation including an existing corporation was without authority of law.

Though such proceedings were instituted none were necessary, but such a proceeding was necessary in the San Angelo

case, as in that case there was a mere irregularity in the proceedings by which that corporation was formed. In Lum vs. City of Bowie, 18 S. W. Rep., 142, a collateral attack upon the corporate existence of the City of Bowie was upheld. The facts were these:

In 1883, the town of Bowie was incorporated under the general law as a town of more than 200 and less than 1000 inhabitants. In 1887 the citizens of the town and other territory attempted to incorporate as a town of 1000 inhabitants or over, and after a petition had been presented, an election held and the result declared, a municipal government as provided for towns of over 1000 inhabitants was organized, and taxes levied on the complainant's land, which was within the boundaries of the attempted corporation of 1884, but without the boundaries of the corporation of 1883. Complainant brought suit to enjoin the collection of the taxes. The only question in the case was whether the proceedings and the organization of 1884 were absolutely void. The court held the original incorporation of the town of Bowie in 1883 remained as it was with its territorial limits as originally defined, and that the proceeding in 1884 by which a corporation was attempted to be formed including an existing corporation were not mere irregularities, but were absolutely void.

So far as we have been able to find, the decisions outside of Texas are in harmony with the Texas cases above cited. In the case of Town of Decorah vs. Bullis, 25 Iowa, 12, there was a collateral attack upon the corporate existence of the town of Decorah, which was incorporated in 1857 under the Iowa Code of 1851 and acted until 1860, when, without any dissolution of that corporation, the people of the town elected officers pursuant to the act of 1858, and thereafter operated under that act, under the assumption that by this means the town was legally organized under the act of 1858. The original charter vested the legislative authority in a president and board of six trustees and provided for a secretary and required election of the officers to be held annually on

the last Tuesday in June. Acting under the act of 1858 the people elected on the first Monday in March, a mayor, recorder and five trustees, and the town council consisting of these officers passed a certain ordinance. In a suit by the town based upon the ordinance, the defendant denied the corporate power of the town under its organic law to pass such an ordinance. The court reached the conclusion that the town of Decorah did not become in law organized under the law of 1858 by the abandonment of its charter and electing officers and operating under that law, but that on the contrary, the organic act of the town continued to be the code of 1851, and the charter adopted thereunder, and that the ordinance passed by the town council was unauthorized and void.

The case of Welch vs. St. Genevieve, 1 Dillon, C. C., Rep., 130, heard before Judges Dillon, Treat and Krekel, directly applies to the question under consideration. In that case plaintiff sued on the bonds issued by the city of St. Genevieve, that was incorporated by the special act of 1849, and judgment by default was entered in his favor. Execution was issued and returned *nulla bona*, and plaintiff moved the court for a mandamus to compel the mayor and aldermen of the city who were last elected to levy a tax sufficient to pay the judgment. These persons made return as individuals that for a long time they had not been the officers of the city, and that its offices were vacant; that on these grounds the county court, acting under the general laws of the state, in 1867, declared the "Town of St. Genevieve" incorporated by the name of "The Inhabitants of the Town of St. Genevieve."

Judge Dillon in rendering the opinion of the court says: "I deny that a corporation created by the legislature, for the purpose of a local municipal government can, without a provision to that effect, be dissolved by the mere failure to elect officers. The corporation is created by the charter". * * * "The charter or constituent act of the corporation of St. Genevieve not being limited in duration and not

having been repealed by the legislature is still in force, and the artificial body which it created still exists. * * * The corporation offices became vacant and not having been filled are still vacant, and we have the anomaly presented of a public corporation without any officers de jure or even de facto to execute its powers or fulfill its duties. It is now suggested that the old corporation if not dissolved in the manner before considered was nevertheless dissolved or superseded by the organization in 1867 of the town corporation by the county court under the general laws of the state. If it was thus superseded the enquiry would arise whether the town corporation was anything more than the authorized legal successor of the old corporation and bound to discharge its obligations. But on examining the above mentioned statutes under which the supposed new incorporation was attempted, and on which it rests for all the legal virtue it possesses, we find that it only authorizes in the mode therein prescribed, the incorporation of towns and cities not already incorporated. It does not empower a town or city incorporated by special charter, and which cannot, therefore, destroy its corporate life at its own pleasure, to abandon its charter without the consent of the legislature which gave it, thereby leaving the locality without municipal government or rule.

"Legislative sanction is, in this country, indispensibly necessary to the existence of every corporation, and as this new town organization is without legislative authority, it is wholly without validity, and its officers have no right in law to exercise powers under the general incorporation act; much less have they the right to exercise the functions of officers under the special charter.

"The city corporation being that which was established by the legislature under the charter, and that corporation remaining in existence, although it is without officers, it is clear that no validity can attach to an unauthorized organization under the general law. * * *

"The corporation under the special charter and its amend-

ments is the legal and only corporate body; the new organization is a bald usurpation of the franchises of the state, and its acts, unless ratified by the legislature, are simply void."

In Morton vs. Carlin (Neb.), 70 N. W., 966, the facts were similar to the Texas case of Lum vs. Bowie, above cited, and the Supreme Court of Nebraska held that the proceedings by which a corporation was attempted to be formed including an existing corporation were absolutely void, and that the corporation so attempted to be formed had neither a de facto nor a de jure existence. To the same effect was the opinion of the Supreme Court of Michigan in Cain vs. Brown, 70 N. W. Rep., 338. But even if the decision of the Texas courts above cited should be found to conflict with decisions of other courts, or they should be thought to be wrong in principle, still the subject to which they relate being the formation and existence of subordinate tribunals of the state and the construction of state statutes, they will be followed by this court. In Norton vs. Shelby County, 118 U. S., 425, this court said: "The decision of the Supreme Court of Tennessee as to the constitutional existence of the board of commissioners of Shelby county is one of this class. That court has repeatedly adjudged, after careful and full consideration, that no such board ever had a lawful existence; that it was an unauthorized and illegal body; that its members were usurpers of the functions and powers of the justice of the peace of the county, and that their action in holding the county court was utterly void.

"This court should neither gainsay nor deny the authoritative character of that determination."

In Claiborne County vs. Brooks, 111 U. S., 400, 410, it was said:

"It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts

on the subject will be regarded as authoritative by the courts of the United States."

In D'Wolf vs. Roband et al, 1 Pet., 501, the court said:

"What might be our own view of the question, unaffected by any local decisions, it is unnecessary to suggest; because the decisions in New York upon the construction of its own statute, and the extent of the rules deduced from it, furnish in the present case a clear guide for this court."

In the United States vs. Morrison, 4 Pet., 137, the Supreme Court of the United States followed the construction placed by the Court of Appeals of Virginia on a statute of that state, although the latter court had never construed the statute until after the case under consideration had been appealed to the Supreme Court of the United States. And in Davis vs. Briggs, 97 U. S., 628, the Supreme Court placed a different construction on a statute of North Carolina from what it before placed upon similar statutes of other states in order to follow the construction placed upon the statute by the Supreme Court of North Carolina.

In the case of Warburton vs. White, decided February 26th, 1900, this court said that "where state laws governing real property or controlling relations which are essentially of a domestic and state nature, in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state courts of last resort to the statutes of the state, and thus conform to the rule of property within the state. It is undoubted that this rule obtains, even though the decisions of the state court from which the rule of property arises may have been for the first time announced subsequent to the period when a particular contract was entered into." The question of following the decisions of the state courts was considered in the case of Burgess vs. Seligman, 107 U. S., 20, where this court said, "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that

by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal Courts * * * * as authoritative declarations of what the law is. But * * * * when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt." This court should follow the decisions of the Texas courts above cited, not only because they construe the statutes of the state, but also because it is evident that inextricable confusion will result from any other course. From those cases it appears that the Supreme Court of Texas has decided a number of attempted corporations, such as the attempted corporation of the City of Lampasas in 1883, to be void. These cities have all doubtless resumed the performance of their duties under their original charters, and, acting thereunder, have entered into new contracts and incurred new obligations, as has been done by the City of Lampasas (see 34th finding on pages 35 and 36 of record.) If the old obligations, such as those sued on in this case, are by the court held to be valid, then the taxing power of the city will have been exhausted, so that many of the new obligations issued in accordance with the statutes as construed by the state courts will be worthless, as will be those of the City of Lampasas, for the reason that a levy of a tax of 25 cents on each one hundred dollars in value of the property in the city

will not raise enough money to pay the interest on the bonds of the series in controversy in this suit and create a sinking fund of two per cent, the said tax of 25 cents being the maximum rate allowed by the Constitution of Texas, and an issue of bonds being illegal where such taxation will not produce enough money to pay the interest thereon and create a sinking fund of two per cent. Gould vs. City of Paris, 68 Texas, 517 (see 23rd, 31st and 34th Findings on pp. 33, 35 and 36 of record.) The result of a refusal on the part of this court to follow the state decisions will be that in suits in the Federal Courts all such debts as those sued for in this cause will be held to be valid obligations of such cities, and in the state courts they will be held to be void. In suits upon such obligations as those entered into by the City of Lampasas since it resumed operations under its original charter, if the suits are in the state courts such obligations will be held to be valid, but if the suits are in the Federal Courts the obligation will be held invalid because the taxing power of the cities was exhausted before they were incurred. The reason for the general rule of the Federal Court to follow the decisions of the state courts is to obviate just such uncertainty and confusion as this, and we submit that this court should adopt that construction of the statutes of Texas which has been given them by its own courts and hold that the attempted incorporation in 1883 was wholly void as being created without warrant of law and that it could create no debts that would be binding on defendant.

THIRD PROPOSITION.

The officers by whom the bonds were issued were not de-facto officers of defendant:

In support of its opinion in this case the trial court cited the case of Shapleigh vs. San Angelo and the case of the City of Lampasas vs. Talcott, decided by the Circuit Court of Appeals, 5th circuit on the .....day of ...1899. In the former case no question of de facto officers was involved. The Tal-

cott case was a companion case to the one under consideration and involved the validity of the same bonds. In that case the Circuit Court of Appeals held that the officers by whom the bonds were issued were de facto officers although they were acting for and as officers of the illegal organization of 1883 and under the general laws of the state. We cannot conceive of a person being a de facto officer when he does not assume or claim to be such officer. If one does not claim to be an incumbent of an office he cannot be a de facto officer. The officers who issued the bonds did not pretend to be the officers of defendant. The bonds were issued by a city council composed of a mayor and five aldermen, holding office under the organization of 1883 and claiming to act thereunder and not under the charter of 1873, some of said aldermen not residing within the boundaries of 1873 (16th and 18th findings of the court). This city council certainly cannot be held to be a de facto tribunal or legislative body of defendant, whose affairs under its charter were to be managed by a board of aldermen composed of a mayor and eight aldermen (see first finding, Tr. 24). The treasurer who participated in the execution of the bonds could not be a de facto officer of defendant, whose charter did not provide for such an officer, nor did it provide for any such body as a city council to administer its affairs. (Morton vs. Shelby County, 118 U. S., 425.) In the case of Town of Decorah vs. Bullis above cited, the court said: "By the charter the legislative authority of the town was vested in a president and six trustees. These officers were by the charter required to be elected annually on the last Tuesday in June. This body, not another body, must exercise the legislative authority of the corporation. To no other body does the organic law of the place give the power to pass ordinances. The body which passed the ordinance in question was in law a different body from that provided in the charter. It was elected under a different law. * * * The election was held at a different time from that required by the charter. The body elected was a different body because differently named and different-

ly constituted. It consisted of a mayor, recorder and five trustees, and not of a president and six trustees. The latter body was not in law the legislative body of the corporation. If the corporate body which passed the ordinance had assumed to act under and by virtue of the charter, in other words, had assumed and claimed to be the trustees of the town under its organic act, their acts as such officers being in such case officers de facto, would undoubtedly be valid. But the body which passed the ordinance made no such claim and assumed no such powers. They claimed to act under the statute of 1858, not as the legislative body authorized by the charter * * * but as a legislative body of a new or re-organized corporation whose existence in point of law was mythical. * * * The only doubt the court has had respecting this case is whether it was not one in which to apply the doctrine that the acts of de facto officers, as distinguished from the acts of mere usurpers, are valid.

"But in addition to the reasons above given there seems to be an insuperable objection to this view in the fact that before one can claim to be a de facto officer of the law, there must be a law creating the office. The office itself must be de jure; the officer may then be de facto.

"To the organic law of the town there was no such office known as the office of mayor; no such office as that of recorder; nor no such office as the five trustees specified in section 31 of the act of 1858. How then can persons assuming to be mayor, recorder and trustees, elected as such, styling themselves such, and acting and professing to act as such by virtue of a law which has no application to the town, claim to be de facto officers of the corporation when the corporation has in law no power in any case or under any circumstances to elect such officers."

In the case of Welch vs. St. Genevieve above referred to the court said:

"If the gentlemen who are claiming under the new organization to be the officers of the town had been elected under the new charter, though irregularly, and were exercising and

claiming to exercise the powers given by the charter which is still the organic act of the municipality they would be in the true sense of the term, officers de facto, and their acts as respects the public would be valid, and this court might notwithstanding the irregularities in their election, issue its mandamus to them to levy and collect the tax necessary to satisfy the plaintiff's judgment. But they were not elected under the charter, nor do they claim or assume to be the officers of the city."

The pretended corporation of 1883 included nearly three times as much inhabited territory and over twice as many inhabitants as the territory defined in defendant's charter; its governing body and officers were different, were elected at different times, and did not claim at any time to represent defendant or to act under its charter. We therefore urge that our contention that the officers who issued the bonds were not de facto officers of defendant is right in principle and supported by the authorities. (See Harness vs. The State, 76 Texas, 571.)

FOURTH PROPOSITION.

The defendant is not the successor of the municipality attempted to be created in 1883, is not composed of substantially the same inhabitants and has not succeeded to any of its property rights. It is, therefore, not liable on the bonds issued by it.

From the findings of the trial court (Rec. 37) it is evident that its judgment is founded principally on that part of the opinion of this court in the case of Shapleigh vs. San Angelo, where it is said: "that the disincorporation by legal proceedings of the City of San Angelo did not avoid legally subsisting contracts, and that upon the re-incorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligations of the old devolved upon the new."

Conceding that the corporation under the name of the

City of Lampasas attempted to be formed in 1883, was not an absolute nullity, as above contended, but was merely an irregularly formed corporation, still defendant is not liable for obligations contracted by it under the doctrine as enunciated in the San Angelo case, because:

1st. It is not its successor.

2nd. It did not acquire any of its property or improvements for which the bonds in controversy or other liabilities were issued or contracted.

First. The defendant was created a corporation in 1873 with an area of 553 acres (see Rec. 24.) It was an existing corporation when the corporation of the same name was attempted to be created in 1883, was an existing corporation when the bonds were issued in 1885 and has continued to exist until now. How, then, can it be deemed the successor of the organization of 1883? When the corporation of 1883 ceased to perform any functions in 1890 the defendant again began to exercise the privileges conferred by its charter, the exercise of which had ceased for a number of years. It is urged, however, that after defendant began the exercise of those privileges a considerable portion of the territory of the corporation of 1883 was added to and became a part of the territory of defendant so that thereafterwards the defendant's limits embraced substantially all the persons and property embraced within the boundaries of the corporation of 1883. Does that fact create a liability which did not exist before? It will scarcely be contended that if the bonds were not issued by the officers or de facto officers of defendant; they constituted liabilities of defendant at the time of their issuance. If not then liable, when did defendant become liable?

Certainly, not when the organization of 1883 was abandoned, because the defendant then did only what the law required it to do, that is, resume the performance of its duties under its charter. If the holders of the bonds then had any right, it was a right to proceed against the persons and property within the territory of 1495 acres embraced within

the limits of the corporation of 1883. Now these being the debtors, is defendant liable because it added a part of that territory to it? Certainly not. It might be liable in some equitable proceeding, but is not liable on the contract sued on as the successor of the corporation attempted to be formed in 1883. An examination, however, of the facts as found by the court, will, we think, show that defendant's territory does not, even after the addition of part of the territory of the corporation of 1883, include substantially the same inhabitants, territory and property as was included within the boundaries of the latter corporation, and will show that a railroad depot, business houses and many residences that were in the limits of 1883 are not in defendant's limits. These findings show that the territorial area of defendant was 553 acres and that of the corporation of 1883 was 1495 acres, of which amount 428 acres was added to defendant in 1890, and after this addition 22 per cent of the inhabitants and 34 per cent of the territory embraced in the corporation of 1883 was and still is outside of the limits of defendant. (See 1st, 5th, 7th, 11th, 12th, 13th, 15th and 28th findings. Tr. 24, 25, 26, 27, 28, 34 and 35.)

Does the Shapleigh case go to the extent of holding that 78 per ceut of the inhabitants, living upon 981 acres out of 1495 acres, and owning 90 per cent in value of the larger area, are substantially the same inhabitants and includes the same resources for revenue? The very gist of the Shapleigh decision is that the same or "substantially" the same people who created the debt, should pay it. The word "substantially" is not defined or limited in its meaning in that opinion. The case was decided upon demurrer to plaintiff's petition, wherein was the following allegation, "that the territory of the new corporation was all embraced in the boundary lines of the old organization, and although smaller in area than the territory of that organization, included all the lands thereof actually occupied and inhabited as a town." That case is based upon Broughton vs. Pensacola, 93 U. S., 266, and Mobile vs. Watson, 116 U. S., 289. In the Brough-

ton case, the court says: "The citizens residing within the limits of the city proceeded to establish a municipal government with corporate authority under the act of 1869," and the question was whether this new corporation was liable for bonds issued by the old. In that case the incorporators and territory were exactly the same both before and after the reorganization. In the latter case, Watson sued the Port of Mobile to recover on bonds issued by the City of Mobile. The agreement of facts by counsel in that case was, "that the taxable property within the latter * * * was $16,255,093.00, and that all of said taxable property was embraced within the limits of the Port of Mobile, except about $900,000, and that about fourteen-fifteenths of the resident inhabitants of the City of Mobile were resident inhabitants of the Port of Mobile." From these three cases the words, "substantially the same inhabitants" can be gathered to cover no more than fourteen-fifteenths of the inhabitants. Is that authority for holding that 78 per cent of the inhabitants are "substantially" all the inhabitants? If so, where will the line be drawn? It would be grossly unjust and contrary to the contract to relieve a great part of those who contracted the debt from all its burdens. It is unjust to make 78 per cent bear the entire debt and wholly relieve 22 per cent of the inhabitants who equally participated in its creation.

Second. Nor is the defendant liable upon the ground that it has received the property of the corporation attempted to be formed in 1883. The 25th and 26th findings of the court (Rec. 33 and 34) show that when the organization of 1883 was abandoned in 1889, the water works plant for which the bonds in question were issued remained in the hands of an employe of the organization for about a year, when it passed into the hands of persons claiming to own all the bonds. Such persons have ever since controlled and claimed to own the water works: the defendants has never controlled them, but has ever since 1890 paid monthly to those in possession thereof, for the water used therefrom. None of

the other property of the organization of 1883 has ever passed into the hands of the defendant. (Rec. p. 34.) Having received no benefits from the illegal organization of 1883 the defendant is not even equitably bound for any debt it may have attempted to create. In this respect also this case is different from the Shapleigh case, in which the defendant received the full benefit of the improvements paid for with the proceeds of the sale of the bonds issued by the irregularly formed corporation which it succeeded.

FIFTH PROPOSITION.

The ordinance printed on the back of the bonds, the coupons of which are in suit, required the city treasurer to endorse his registration on the bonds, and the statutes of the State of Texas required that the certificate of registration by the comptroller should be also registered on the bonds.

The bonds were issued without the performance of these conditions and were not therefore, legal obligations either of the defendant city or the organization formed in defendant's name in 1883.

There was no certificate of registration of the city treasurer endorsed on the bonds. (Tr. 33.) In the findings of fact of the court appear the following: "On the back of said bonds was the following endorsement: 'Registered March 18, 1885, Wm. J. Swain, Comptroller,' but no seal was affixed to such signature or endorsement." (Tr. 33.)

Sections 4 and 5 of the ordinance requiring the registration of the city treasurer to be endorsed on each of the bonds are quoted in the preliminary statement above. (Tr. 28 and 29.)

The Revised Statutes, 1879, of the state, requiring the endorsement by the comptroller of his certificate of registration, reads as follows:

"Art. 423. It shall be the duty of the mayor whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the state,

whose duty it shall be to register such bond or bonds in a book kept for that purpose, and to endorse on each bond so registered his certificate of registration and to give at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date."

"Art. 2738. He (the comptroller) shall procure at the expense of the state a seal with the words 'Comptroller's office, State of Texas' engraved around the margin, and a star with five points in the center thereof, which shall be used sa the seal of the comptroller's office in the authentication of all his official acts, except warrants drawn on the treasury of the state."

The doctrine is well established by this court, that if the directions prescribed either in the ordinance under which municipal bonds are issued, or by the statutes of the state, are not complied with, the payment of the bonds cannot be enforced in a suit at law.

Anthony vs. Jasper County, 101 U. S., 693, was a case involving the validity of municipal bonds which had not been registered by the auditor of the State of Missouri in accordance with a statute of that state, and the court held that the endorsement of registration thereon by the auditor was a part of the execution of the bonds and that no legal liability was created until such endorsement was made. The court further said "that other circumstances may exist which will give the holder an equitable right to recover from the municipality the money which the paper he has got represents, but he has no bond which he can enforce as such, or which can be put on the market as commercial paper." That decision was not based upon the fact that the statute required that the bonds should be registered before they should have any validity or be negotiated, but was based on the fact that the statute required the certificate of registration to be endorsed on the bonds, the court holding that such endorsement was necessary as a part of the execution of the instrument, and citing with approval McGarrahan vs. Mining Co., 96 U. S., 316.

In that case the question was whether a patent for land had been properly executed. The statutes required that such patents be signed in the name of the president, sealed with the seal of the general land office and countersigned by the recorder, and the court held that until all these things had been done, the United States had not executed a patent. The patent under consideration had been signed by the president, was sealed with the seal of the general land office, but was not countersigned by the recorder, and the court held that the execution was not complete, saying, "each and every one of the integral parts of the execution is essential to the validity of the patent. They are of equal importance under the law, and one can not be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulation would constitute a valid grant, but what the statute requires."

The above case, of Anthony vs. Jasper County is approved in Hoff vs. Jasper County, 110 U. S., 53, and in Louisiana vs. Woods, 102 U. S., 294.

In the latter case the city had fraudulently dated the bonds back beyond the time when the statute requiring registration was passed, and having put the bonds on the market as instruments not requiring registration, the court held that it was liable for the amount of money it received for the bonds.

The case of Anthony vs. Jasper County is also cited with approval in Bissell vs. Spring Valley Township, 110 U. S., 162, in which case it was also held that where the law required bonds of a township to be attested by the county clerk, the signature of such officer is essential to the valid execution of the bonds, even though he had no discretion to withhold it, and the bonds issued without his signature are not the bonds of the township.

It is also cited with approval in Coler vs. City of Cleburne, 131 U. S., 162, and in Young vs. Township of Clarendon, 132 U. S., 340.

The doctrine announced in Anthony vs. Jasper County, and its application in the other cases to bonds in the execution or registration of which various officers were required to perform some act, directly sustains our contention that the bonds in controversy could not become a legal obligation until the certificate of registration of the city treasurer and comptroller of the state were endorsed thereon. The omission of either of these certificates prevented the bonds from taking effect as outstanding obligations. There was not even claimed to be any endorsement of registration by the city treasurer This omission raises the question fully, and it is immaterial as to the endorsement of the comptroller. We think, however, that the words "Registered March 28, 1885, William J. Swain, Comptroller," were not a compliance with the state statutes. The comptroller was by statute required to have a seal of office and to use the same "in the authentication of all his official acts except warrants drawn on the treasury of the state." The certificate upon bonds to be such as required by law must be authenticated by his official seal. The seal was as necessary, if not more so, than his signature.

SIXTH PROPOSITION.

The failure of the city treasurer and of the comptroller to endorse respectively their certificates of registration on the bonds at least destroyed the negotiability of the bonds and put plaintiff upon notice of the defense alleged in defendant's answer and found as a fact by the trial court—that the ordinance printed on the bonds required that they be sold at not less than par and the proceeds devoted to the construction of a system of waterworks, while in evasion of the ordinance the bonds were exchanged for a system of waterworks worth much less than the face of the bonds.

The section of the ordinance requiring that the bonds be sold at not less than par and the proceeds devoted to the construction of a system of waterworks is set out in the

preliminary statement above. The court found as a fact that the city council attempted to sell the bonds for cash, and were unable to do so; that a responsible party offered to build a system of waterworks for $25,000 in cash, but was unwilling to take the $40,000 bonds in payment; that afterwards the city council awarded the contract to another bidder who was willing to build a system of waterworks at the nominal price of $40,000, and accept the bonds in payment. And the court further finds "the city officers paid for the waterworks in bonds, because they had been unable to sell the bonds for money; the bonds were not considered good for their face value; if they had been so considered the waterworks would have been constructed for less." (Tr. 31 and 32.) The decisions discussed under the first proposition above certainly go to the extent of holding that the defects mentioned in the bonds under consideration destroy their negotiability, and subject them in the hands of any subsequent holder for value to the same defense as might legally be interposed to them in the hands of the person to whom they were originally issued and delivered. The only question then is what was the effect of exchanging the bonds for property worth materially less than their par value contrary to the provisions of the ordinance printed on the bond? We think Scipio vs. Wright, 101 U. S., 673, and Thompson vs. Perrin, 103 U. S., 806, and the authorities referred to in these cases are conclusive. The courts in these cases directly hold that the bonds issued under such circumstances are unenforceable in a suit at law.

SEVENTH PROPOSITION.

At the time of the issuance of the bonds mentioned in plaintiff's petition the only legal existing City of Lampasas was the defendant with boundaries fixed by its charter of 1873, and at the time of such issuance the property within such boundaries was in value about one million dollars, and the levy and collection of a tax of 25 cents on each one hundred dollars in value of such property would not then,

or at any time since, produce enough revenue to pay the interest on said bonds and create a sinking fund of at least two per cent., and such issuance of bonds was therefore illegal, as being in violation of section 9 of article 8 and section 7 of article 11 of the Constitution of the State of Texas, and no subsequent change in defendant's boundaries or increase in its territory or taxable property would render such bonds valid.

The question presented by this proposition was not in the case of City of Lampasas vs. Talcott decided by the Circuit Court of Appeals, and referred to above because the pleadings in that case, as in this, did not indicate that either plaintiff or defendant considered that the bonds were issued by the City of Lampasas under its charter of 1873, but in the opinion of the Circuit Court of Appeals in that case it was held that the bonds were issued by the City of Lampasas as created by the special act of 1873, the court saying "The dominant question in the case is: Had the corporation, at the date of these bonds the right to issue them. * * * * The officers representing the city in the issuance of the bonds believed that they were clothed with authority by the procedure of 1883. In this they were mistaken. The charter of 1873 was still in existence. It authorized the election of officers of the city. These officers had been elected. Although they believed that they held office under the new organization, they were officers de facto of the city, actually filling places created by the special act of 1873. * * * * The bonds, we hold, were not made invalid by reason of the illegal effort at incorporation made in 1883." Under our third proposition we have stated our reasons for believing that the Circuit Court of Appeals was in error in holding that persons holding offices not provided for in the act of 1873 and not pretending to act thereunder could be de facto officers of defendant. If, as stated in the opinion, the charter of 1873 was still in existence, then, of course, the city only included the territory de-

scribed in the charter, and if the property within that territory was not of such value as would authorize the issuance of the bonds, the issuance thereof was illegal. The amount of bonds which a city can issue is controlled or limited by section 9 of article 8, and section 7 of article 11 of the Constitution of Texas.

Section 9 of article 8 of the Constitution of the State of Texas of 1876 as amended in 1883 was as follows:

"Sec. 9. The State tax on property, exclusive of the tax necessary to pay the public debt, and of the taxes provided for the benefit of the public free schools; shall never exceed thirty-five cents on the one hundred dollars value, and no county, city or town shall levy more than twenty-five cents for city or county purposes and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the amendment, and for the erection of public buildings, street, sewer and other permanent improvements, not to exceed twenty-five cents on the one hundred dollars valuation in any one year, and except as in this Constitution otherwise provided."

That part of section 7 of article 11 of the Constitution material to the question under discussion is as follows:

"But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon, and provide at least two per cent as a sinking fund."

To pay the interest on the bonds described in plaintiff's petition and provide a sinking fund of two per cent would require $3,600 per annum. The highest tax authorized by the Constitution was one-fourth of one per cent. To raise the amount of $3600 with a tax of one-fourth of one per cent the value of the property taxed must have been not less than $1,440,000.

The total value in 1885 of the property in the territory embraced in the boundaries of the organization of 1883; was

$1,447,200 (Rec. p. 33); this included a large amount of property that was not in the boundaries of the city chartered in 1873 and which the Circuit Court of Appeals held to be the only existing city at the time of the issuance of the bonds in 1885. The exact amount of taxable property in 1885 within defendant's limits as fixed by its charter of 1873, does not appear from the findings of the court, but the findings do show that the value of such property was less than one million dollars. They show that between 1885 and 1889 there was a great depreciation in the value of property in all portions of the territory attempted to be incorporated in 1883, and that the depreciation was greatest in that part thereof not included within the limits of the charter of 1873, (see 31st finding of the court) and that in 1889 the assessed value of the lands within that part of the territory of the organization of 1883, added to defendant's territory in 1890 was $157,915, and the value thereof, that has never been added to defendant's territory, was $68,970. (See 14th finding on pp. 27 and 28 of Record.) The value of the personal property in these portions is not shown, but the total assessed value of all property within the boundaries of 1883 in 1889 was $1,064,429 (Rec. 27 and 28). Making reasonable allowance for depreciation of the value of the real property in the organization of 1883, in the year 1885 that was not then included in defendant's boundaries, must have been considerably over $300,000, leaving the assessed value of the real and personal property in defendant's limits in 1885 to be only about $1,000,000, whereas any less amount of property than $1,440,000 would not authorize the issuance of the bonds in controversy. (Gould vs. City of Paris, 68 Tex., 517; Citizens Bank vs. City of Terrell, 78 Tex., 450 and authorities of this court therein cited.) Nor is the defendant concluded by the amount of the assessed values as certified to by the officers of the organization of 1883, because they certified only as to values of the property within the territory of that organization for which they assumed to act, and they assumed to act only for that organization.

See 23rd and first part of 16th findings. (Rec. 33 and 28.) Every person dealing with a city must take notice of its charter. The assessment rolls upon which the valuation of the property of the city was based was notice to any purchaser of the bonds that the valuation of the property within the charter limits of defendant, was much less than the value necessary to authorize the issuance of bonds to the amount of $40,000. (Citizens Bank vs. City of Terrell, above cited.) The bonds were all issued and delivered at one time (Rec. p. 20), so that if they are a binding obligation for any amount, none of them are binding obligations for the full amount thereof. The plaintiff was therefore, not entitled to recover in the present condition of the pleadings, even if he be entitled to recover in any other than an equity proceeding.

On account of the errors above assigned, the plaintiff in error asks that the judgment of the Circuit Court be reversed and that judgment be here rendered for plaintiff in error.

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APPENDIX A.

1 Sayles' Texas Civil Statutes, 2nd Edition, Title XVII.

Art. 340. Any city within the limits of this state, containing one thousand inhabitants or over, may accept the provisions of this title in lieu of any existing charter by a two-thirds vote of the city council of such city, which action of the city council shall be had at a regular meeting thereof and entered upon the journal of their proceedings, and a copy of the same, signed by the mayor and attested by the city clerk or secretary under the corporate seal, filed and recorded in the office of the clerk of the county court of the county in which such city is situated; and the provisions of this title shall be in force, and all acts theretofore passed, incorporating such city, which may be in force by virtue of an existing charter, shall be repealed from and after the filing of the said copy of their proceedings as aforesaid. Any city containing one thousand inhabitants or over, may be incorporated as such city in the manner prescribed in chapter 11 of this title relating to towns and villages; provided, that whenever the words town or village are used in said chapter 11, they shall be construed to mean city having 1000 inhabitants or over; and provided, that the application to become incorporated shall be signed by at least fifty residents thereof; and when the entry of the county judge (provided in article 514 of said chapter 11) is made with reference to a city of one thousand inhabitants or over, such city shall be invested with all the rights and powers of such cities conferred by this title. (Amendment April 6, July 30, 1881; 17 Leg., p. 115.)

Art. 343. The bounds and limits of said city shall be and remain the same as fixed and defined by the provisions of the act of incorporation substituted by the provisions of this title, provided, that said limits of said corporation may be hereafter extended by adding additional territory to the same whenever the majority of the qualified electors of said territory shall indicate a desire to be included within the limits of said corporation. (Act March 15, 1875; 14 Leg., S. S., pp. 156.)

Art. 344. The municipal government of the city shall consist of a city council composed of a mayor and two aldermen for each ward, a majority of whom shall constitute a quorum for the transaction of business, except at call meeting or meetings for the imposition of taxes, when two thirds of a full board shall be required, unless herein otherwise specified; provided, that where the city or town shall not be divided into wards, the city council shall be composed of the mayor and five aldermen and the provisions of this title relating to proceedings in a ward shall apply to a whole town or city. The other officers of the corporation shall be a treasurer, an assessor and collector, a secretary, a city attorney, a marshal and city engineer, and such other officers and agents as the city council may at any time direct.

The above named officers shall be elected by the qualified electors of said city as hereinafter provided for and shall hold their offices for two years and until the election and qualification of their successors. (Amendment April 6, June 30, 1881; 17 Leg., p. 115,)

Art. 345. An election shall be held in each of the wards of said city on the 1st Tuesday in April next after the acceptance of the provisions of this title, annually thereafter, at such place or places as the city council may direct, and of which 30 days previous notice shall be given by publication in one or more newspapers of said city. Said election shall be ordered by the city council, and in case of their failure to order the same, the mayor of the city may make such order. For the purpose of holding said election and others ordered, the city council shall appoint annually in May or earlier, in each ward some competent and suitable person who shall be the presiding officer at all elections held in his ward.

Art. 503. Whenever a majority of the inhabitants qualified to vote for members of the state legislature of any territory adjoining the limits of any city, accepting the provisions of this title, to the extent of one-half mile in width, shall vote in favor of becoming part of said city, any three of them may make affidavit to the fact, to be filed before the

mayor, who shall certify the same to the city council of said city. The said city council may by ordinance receive them as part of said city; from thenceforth the territory so received shall be a part of said city, and the inhabitants thereof shall be entitled to all the rights and privileges of other citizens, and bound by the acts and ordinances made in conformity thereto and passed in pursuance of this title. (Act March 15, 1875; 14 Leg., S. S., p. 112.

The following articles are part of title 17, chapter 11:

Art. 506. When a town or village may contain more than two hundred and less than ten thousand inhabitants it may be incorporated as a town or village in the manner prescribed in chapter 11, title 17, of the Revised Civil Statutes. (Amendment March 26, 1881; 17 Leg., p. 63. See ante, article 340a.)

Art. 507. If the inhabitants of such town or village desire to be so incorporated, at least twenty residents thereof, who would be qualified voters under the provisions of this chapter shall file an application for that purpose in the office of the judge of the county court of the county in which the town or village is situated, stating the boundaries of the proposed town or village, and the name by which it is to be known if it be incorporated.

Art. 508. If satisfactory proof is made that the town or village contains the requisite number of inhabitants it shall be the duty of the county judge to make an order for holding an election on a day therein stated, and at a place designated within the town or village, for the purpose of submitting the question to a vote of the people.

Art. 509, provides for the appointment of judges and clerks of the election and makes other provisions therefor.

Art. 510 prescribes the qualification of voters.

Art. 511. On each ticket the voter must write or cause to be written or printed, "corporation" or "no corporation."

Art. 512. If a majority of the votes are cast in favor of incorporation, the officers holding the election shall make re-

turn thereof to the county judge of the county within ten days after the same was held.

Art. 513. The county judge shall, within twenty days after the receipt of returns, make an entry upon the records of the commissioners court that the inhabitants of the town are incorporated within the boundaries thereof, which shall also be designated in the entry, and a certified copy of such entry shall thereupon be recorded in the proper record of deeds of such county.

Art. 514. When the entry mentioned in the preceding article has been made the town shall be invested with all the rights incident to such corporations under this chapter, and shall have power to sue and to be sued, plead and be impleaded, and to hold and dispose of real and personal property; provided, such real property is situated within the limits of the corporation.